and in fact the defendant had admitted entering into these contracts in their defence. Mr. Smith for the defendants sought to amend but an amendment was, in my opinion, not necessary as if it transpired that the document was not a contract it was the duty of the Court so to find whether pleaded or not. I think the real effect of the pleading, which was a simple traverse, was that the document whether contract or order was admitted.

The plaintiffs as indenting agents were acting on behalf of foreign principals and had no power to contract but simply a sole and exclusive right to obtain orders. In the Conditons of Sale attached to the last three Orders reference is specifically made in each case to "the Order or any resulting contract."

For these reasons, in my judgment, the plaintiffs' claim fails at the outset and it is unnecessary to consider the facts.

All I need add in passing is that no attempt was made to prove the damages, with the possible exception of the plaintiffs' commission, and this, as I understood it, was conceded by Mr. Hilborne.

Assuming therefore that the plaintiffs were successful in respect of all the four transactions both on the law and on the facts the total amount of their claim would be limited to $730.69.

There must be judgment for the defendants and the plaintiffs' claim is dismissed with costs.

Judgment for the defendants.

Solicitors:—*Hilborne, Chung & Co.; L. A. J. Smith.*

PUBLIC PROSECUTOR v. KOK KHEE

[A.Cr.J. (Ong J.) September 27, 1963]

[K.L. — Criminal Appeal No. 53 of 1963]

Criminal Procedure—Arrest by police constable—Non-compliance with proper form—Criminal Procedure Code (Cap.6), ss.15 & 294—Illegal arrest—Whether use of force by accused justifiable.

Municipal Ordinance (S.S. Cap. 133) s.53—By-laws—Hawking without licence—Municipal (Itinerant Hawkers) By-laws, 1957, By-law 2.

Penal Code s.353—Assaulting police constable in execution of duty—Arrest not in proper form—Whether arrest illegal.

The respondent was charged on two charges namely (i) hawking vegetables without a licence contrary to By-law 2 of the Kuala Lumpur Municipal (Itinerant Hawkers) By-laws, 1957, an offence under section 53 of the Municipal Ordinance and (ii) using criminal force on a police constable in the execution of his duty an offence punishable under section 353 of the Penal Code. He pleaded guilty to both charges and the Magistrate fined him $10 for the first offence and on the second offence he was bound over for $100 to be of good behaviour for 6 months. On appeal by the Public Prosecutor against the inadequacy of sentence in respect of the second charge,

Held: from the facts as stated by the learned Magistrate the arrest was not made in the proper form as required by section 15(i) of the Criminal Procedure Code and it was justifiable for the respondent to put up a struggle since he was resisting an illegal or unjustifiable use of force against him.

Reasons advanced for not imposing prison sentence.

MAGISTRATE'S CRIMINAL APPEAL.

Gunn Chit Tuan (Deputy Public Prosecutor) for the appellant.

Respondent — not served — absent.

Ong J.: The respondent was charged in the Magistrate's Court at Kuala Lumpur on two charges, namely, (1) hawking vegetables without a licence contrary to By-law 2 of the Kuala Lumpur Municipal (Itinerant Hawkers) By-laws 1957, an offence punishable under section 53(3) of the Municipal Ordinance, and (2) using criminal force to P.C. 28120, a public servant, in the execution of his duty as such public servant, an offence punishable under section 353 of the Penal Code.

Upon pleading guilty and admitting the facts alleged by the prosecution, he was fined $10 on the first charge, and, on the second charge, was bound over in the sum of $100 to be of good behaviour for 6 months under section 294 of the Criminal Procedure Code. The Public Prosecutor appeals against the inadequacy of sentence in respect of the second charge.

The admitted facts, as set out in the record, are as follows:

"On 7.7.63 at about 6.45 a.m. P.C. 28120 and P.C. 1612 were on beat round along Banting Road, Kuala Lumpur and saw accused selling vegetables without a licence. P.C. approached him and told him of the offence. He put up a struggle and took up a daching stick and assaulted P.C. 28120 and the P.C. was injured. Accused was arrested. Medical certificate on P.C. produced, marked 'P1'. Accused taken to High Street Police Station and P.C. 28120 lodged a report."

I think the learned Magistrate properly took a lenient view of a first offence since it had its origin in a trifling transgression of a Municipal By-law. Moreover, the facts as stated in skeleton outline, would appear to justify the respondent putting up a struggle since he was resisting an illegal or injustifiable use of force towards him. Unless and until an arrest had been made legally, in the proper form, as set out in section 15(i) of the Criminal Procedure Code — and there is nothing to suggest that this had been done — the respondent was, in my opinion, entitled to prevent or resist what ostensibly was an unlawful seizure or confiscation of the "daching" which

was his private property. A further ground for not imposing any prison sentence or substantial fine is that the respondent is 18 years old, and a heavy fine on a person attempting to earn an honest living may result in his imprisonment in default, or payment of the fine on his behalf by innocent relatives.

After careful consideration, I am satisfied that his pleading guilty had been made under a misconception of the powers of police constables before (as distinct from after) they made a proper arrest. Acting therefore under my powers of revision, I feel that it is right and proper that I set aside the conviction on the second charge and quash the order made under section 294 of the Criminal Procedure Code. Justice must not only be done but must be seen to have been done.

Conviction set aside.

PACKEER MOHAMED & ANOR. v. YEO CHING TAY

[A.C.J. (Ong J.) September 29, 1963]

[K.L. — Civil Appeal No. 11 of 1963]

Landlord and Tenant—Eviction of trespasser—Length of notice—Whether once when valid notice to quit given new tenancy created by subsequent notice to quit—Control of Rent Ordinance, 1956.

A calendar month's notice to quit is not required if a landlord wishes to evict a trespasser.

When a valid notice has been given a new tenancy can be created only by an express or implied agreement. A subsequent notice to quit is of no effect unless other circumstances form the basis for inferring a new tenancy having been created after the expiry of the first notice: *Loewenthal* v. *Vanhoute & Anor.*(1) followed.

Case referred to:—

(1) *Loewenthal* v. *Vanhoute & Anor.* [1947] 1 All E.R. 116.

CIVIL APPEAL.

N. A. Marjoribanks for the appellants.

S. T. Chung for the respondent.

Cur Adv. Vult.

Ong J.: This is an appeal by the occupier of rent-controlled premises against an order for possession made by the Magistrate, Kuala Lumpur, in favour of the landlord and for payment of double rent from April 1, 1963 till delivery of vacant possession. The learned Magistrate made the order on two grounds: first, that the former occupier Subramaniam was a statutory tenant and as such had no right or interest which he could assign to the appellant; secondly, that continued acceptance of rent by the landlord from his statutory tenant did not convert the statutory tenancy into a contractual tenancy.

The facts disclosed in the evidence are clear beyond any possibility of dispute. The landlord plaintiff is a Chinese lady who has been resident for some time in the United Kingdom. Her affairs in this country have been managed since 1949 by her son under a power of attorney. He had been her agent and rent-collector of the premises in question as well as others owned by his mother. Some time before 1950, a Sikh subtenant of the ground floor of the premises became a direct tenant thereof upon the ejectment of the principal tenant for non-payment of rent. This Sikh was carrying on business under the name or style of Khalsa Flour Mills and rent receipts were issued to him under such trade name. Payment of rent at all times was tendered at the landlord's premises by the Sikh tenant. Accordingly when a Tamil man named Subramaniam came instead in November 1953 to tender rent, the landlord's son and attorney refused to accept the rent from him and promptly sent him a notice to quit (Ex.P2). The former Sikh tenant was not prohibited by the terms of his tenancy from assigning it to Subramaniam, and since the latter had lawfully taken over the Khalsa Flour Mills business, the landlord was prevented by the then Control of Rent Ordinance from taking any proceedings to recover possession. Nevertheless the notice did have the legal effect of making Subramaniam a statutory tenant, and he continued trading under the same firm name 'The Khalsa Flour Mills' (see Ex.P3 dated March 27, 1957).

It is of the greatest significance to note that in this letter of March 27, 1957, Subramaniam took pains expressly to remind his landlord: "You need not call on any one or on the premises for this rent. The same will be sent to you at the above address (i.e. the landlord's home) regularly." It was signed "For Khalsa Flour Mills, S. Subramaniam, Proprietor". Subramaniam then was of course fully aware that he held no better rights to remain in occupation than those of a statutory tenant. He had known what his legal rights were when he and A. Abdul Majeed, the present appellant, consulted a well-known and able advocate and solicitor in Kuala Lumpur and instructed him to draw up an agreement of sale of the business of the Khalsa Flour Mills on December 20, 1955 (Ex. D.14).

In that agreement the recital stated (1) that the vendor Subramaniam was the owner of the flour mill business carried on under the name and style of Khalsa Flour Mills; (2) that the tenancy of the whole ground floor "is in the name of the said business"; (3) that the vendor has